In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 798

BERNARD E. KING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1965. A timely petition for rehearing *en banc* was denied on October 5, 1965. On November 3, 1965, the Chief Justice extended the time for filing a petition for a writ of certiorari to December 4, 1965. The petition was filed on December 3, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

797-888—65

QUESTIONS PRESENTED

1. Whether testimony of what arresting officers saw and took from petitioner's co-defendant at the time of arrest was improperly admitted.

2. Whether the evidence was sufficient to support petitioner's conviction.

STATEMENT

After a jury trial in the United States District Court for the District of Columbia, petitioner and his co-defendant, William E. Ringgold, were convicted of housebreaking and grand larceny, in violation of 22 D.C. Code 1801 and 2201. Petitioner was sentenced to imprisonment for a term of five to fifteen years for housebreaking and three to ten years for larceny, the sentences to run concurrently. The court of appeals affirmed the convictions without opinion.

The evidence may be summarized as follows:

At 10:00 p.m. on Sunday evening, February 2, 1964, at the Park Rexall Drug Store in southeast Washington, D.C. (Tr. 114–115),[1] the day's receipts were placed in a safe, which also contained narcotics, a metal box with about $1,000 in it, rolls of stamps, blank money orders, and spare keys for most of the machines in the store (Tr. 72, 115). The next morning, at 8:30, the first employee to open the store discovered that the safe had been broken open. All of the money and receipts for the previous day were missing, as were the narcotics and spare keys (Tr. 73, 121–122). An examination of other areas of the

[1] The record of trial, filed with the Clerk of this Court, consists of three volumes. The first 69 pages of Volume I deals with a pretrial motion to suppress evidence.

store disclosed that 25 to 30 pearl rings were also missing (Tr. 73–74).

On the morning of Monday, February 3, 1964, some time after 2 a.m., Police Officer Welch observed an automobile driven by co-defendant Ringgold with petitioner as his passenger weaving over the center stripe for about a mile on Maryland Route 214, in Prince George's County. When the car turned onto a side road, Welch halted it. As Welch approached the car, he saw petitioner give a driver's license to Ringgold. Welch ascertained that the car was borrowed. Ringgold, whose driver's license had expired, attempted to represent petitioner's license as his own, but Welch discovered the ruse (Tr. 40–43, 53). Welch shined his flashlight into the car, and saw a metal box partially covered on the rear floorboard, and what appeared to be the face of a safe on the front floor under petitioner's seat (Tr. 43, 80–85). He radioed for help, and then arrested petitioner and Ringgold, charging them both with traffic violations (Tr. 43–44). In the pocket of petitioner's trousers officers found $1,015 in cash (Tr. 98, Gov't. Ex. 6). When Ringgold was searched, he was dressed in a shirt and slacks. It began to rain, and Ringgold asked permission to put on a raincoat which lay in the car (Tr. 92, 208). Ringgold secured the raincoat, and Welch searched it before allowing Ringgold to wear it. In the pockets of Ringgold's trousers and in the raincoat Welch found $885 in cash, three pearl rings, a hinge, a pair of socks, and a key to the money order machine in the drug store (Gov't. Exs.

1, 2, 3, 4, Tr. 85–88). Welch could not recall which items had been found in the raincoat (Tr. 91–92).

On the way to the Prince George's County police station, where the two men were charged with traffic violations (Tr. 44), petitioner denied ownership of the automobile and any knowledge of a safe. When Detective Bryan stated that the police would have to search for the safe's owner, petitioner remarked that "it was not from this county" (Tr. 102–105).

At the trial, both petitioner and Ringgold denied involvement in the housebreaking and larceny. Petitioner's alibi was that he and a friend had spent most of the evening of February 2 in downtown Washington and that he met Ringgold by prearrangement at 2 a.m. to take him to Annapolis to find work (Tr. 147–150, 155–156, 158–163, 172–200). They drove in a car which Ringgold had borrowed about one hour before (Tr. 204–205). On the way, petitioner changed his mind, and asked Ringgold to turn back. Shortly thereafter they were stopped by Welch. Both petitioner and Ringgold said that they gambled frequently, and that they often carried large amounts of money (Tr. 152, 200). Ringgold testified that he did not own the raincoat, but that he saw it in the borrowed car and asked to be allowed to wear it when it began to rain. He said that the fruits of the search other than the money taken from his pocket were discovered in the raincoat (Tr. 208–210, 222–223).

ARGUMENT

1. At the conclusion of a hearing on a motion to suppress the district judge found that the search of

the persons of petitioner and Ringgold were incident to a lawful arrest. However, he deferred a ruling on the question whether there had been a search of the car (Tr. 67). Government counsel then announced that, in view of the decision in *Preston* v. *United States*, 376 U.S. 364, he would consent to the suppression of items found in the car but not of testimony as to what the policeman saw when he shined the flashlight into the car (Tr. 68–69; Pet. App. 17–18). The judge replied, "I don't think there is any question before the Court. Any time counsel want to make any objection to the witness' testimony, the Court will pass upon it then" (Tr. 69). When Officer Welch testified concerning his observation of the metal box and safe door, defense counsel made no objection (Tr. 84–85). Consequently, there was no reason to exclude the evidence. In any event, the claim that the officer could not testify to what he saw when he approached the car to arrest Ringgold for a traffic violation is unsound. Petitioners were validly stopped and arrested, and what was immediately observable with a flashlight was not the product of a search. See *United States* v. *Lee*, 274 U.S. 559.

Petitioner argues that the items found in Ringgold's raincoat could not properly be introduced since the raincoat also came from the car. However, the officer, who had properly arrested Ringgold, manifestly had a right to search the coat for weapons before granting Ringgold's request that he be allowed to wear it. The items found in the coat were obtained by what was essentially a search of the person

and were, therefore, admissible into evidence. See *Hart* v. *United States*, 316 F. 2d 916, 920 (C.A. 5).

2. The government's evidence included testimony that a safe had been demolished and its contents stolen. Items found in the possession of petitioner's companion when arrested answered the description of, or were positively identified as, objects taken from the safe just a few hours earlier. A large amount of money was found on the persons of both petitioner and Ringgold. Under these circumstances the jury could reasonably have concluded that the safe door seen by Welch under petitioner's feet and the steel chest observed in the rear of the car as well as the large amount of cash found on petitioner and Ringgold were all taken from the drug store along with the other items which were positively identified. Petitioner's assistance in passing his driver's license to Ringgold also indicated that they were engaged together in some illegal venture. The total circumstances justified the conclusion that petitioner and his companion had acted in concert in the housebreaking and larceny. See *Walker* v. *United States*, 301 F. 2d 94 (C.A. 5); *United States* v. *Chiarelli*, 192 F. 2d 528 (C.A. 7), certiorari denied, 342 U.S. 913.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1966.

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